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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 107

In the Matter of

WALTHAM WATCH COMPANY, a corporation and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL TRADE COMMISSION, *Respondent.*

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Petitioners, Waltham Watch Company, a corporation and Harry Aronson, Ben Cole and Morris Draft, individually and as Officers of said Corporation, by their attorney, B. Paul Noble, pray that a Writ of Certiorari issue to review the "Final Decree Affirming and Enforcing Order to Cease and Desist"[1] entered on

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[1] Appendix "A" Final Decree Affirming and Enforcing Order to Cease & Desist.

the 1st day of March 1965, by the United States Court of Appeals for the District of Columbia Circuit, affirming and enforcing an Order to cease and desist issued by the Federal Trade Commission on February 28, 1965[2] in its Docket No. 8396.

JUDGMENT

The Judgment[3] of the Court of Appeals was entered February 2nd 1965, without Opinion, in case number 18,647, October Term 1964.[4] The case is not officially reported as of the date of this Petition.

JURISDICTION

The United States Court of Appeals, District of Columbia Circuit entered its Judgement[5] without Opinion on February 2, 1965 affirming and enforcing the final order of the Federal Trade Commission.[6] On March 1, 1965, the Court below entered its Final Decrees Affirming and Enforcing that Order.[7]

The "Decision of the Commission and Order to File Report of Compliance", which is the agency's final order modified the Examiner's Initial Decision[8] by striking certain findings therefrom.

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[2] Appendix "B" Decision of the Commission and Order to File Report of Compliance.

[3] Appendix "C" Judgment.

[4] District of Columbia Circuit.

[5] Appendix "C".

[6] Appendix "B".

[7] Appendix "A".

[8] Appendix "D".

This Court has jurisdiction pursuant to Section 5 of the Federal Trade Commission Act 15 U.S.C.A. 45 (c), (g) and (h), and pursuant to 29 U.S.C.A. 254 (1) and 2101 (c).

The jurisdiction of the court below was founded upon Section 5 (d) of the Federal Trade Commission Act (15 U.S.C.A. 45 (b)).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the use by petitioners of the trade name "Waltham" on imported watches is false, misleading or deceptive?

2. Whether Commission policy adopted subsequent to the entry of the Initial Decision and immediately prior to entry of the final order by the Agency has materially altered standards to be applied by the Agency with respect to marking of country of origin and fictitious pricing and if so, whether the final order is arbitrary and capricious and a denial of due process?

3. Whether the final order of the Federal Trade Commission is contrary to law, arbitrary and capricious and constitutes a denial of due process of law because it is in conflict with other Agency decisions and orders with respect to fictitious pricing?

4. Whether the final order as applicable to designation of patented Resevoil jewels is arbitrary and capricious or constitutes a denial of due process and that the order fails to apply the established definition of a watch jewel?

CONCISE STATEMENT

The jurisdiction of the Court below was founded upon Section 5 (d) of the Federal Trade Commission Act (15 U.S.C.A. 45 (b)).

The Court below affirmed an Order of the Federal Trade Commission and entered its Final Decree affirming and enforcing that Order.

Since the entry of the Order by the Agency after adversary proceedings, the Agency adopted a policy with respect to marking of country of origin which is inconsistent with the Order to Cease and Desist here.

That change of policy is reflected in Administrative Bulletin 64-10 which appears in the Appendix to this Petition.

The effect of that change of policy is to afford to competitors of Petitioners procedural advantages as well as substantive commercial rights denied Petitioners by the Order entered.

In addition, Agency policy with respect to "fictitious pricing" had radically changed since entry of the final order here. That change of policy is reflected in the "Statement on the New Pricing Guides" (Appendix "N") appears in the Appendix hereto.

Ensuing confusion and conflict of Agency decisions is further reflected in the Appendix hereto which contains Agency Decisions entered subsequent to the change of policy.[9]

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[9] In the Matter of Bulova Watch Co.—Appendix "H".
In the Matter of Benrus Watch Co.—Appendix "I".
In the Matter of Gruen Watch Co.—Appendix "J".
In the Matter of Clinton Watch Co.—Appendix "L".
In the Matter of Art National Mfgrs. Dist. Co. Inc.—Appendix "M".
In the Matter of Regina Corp.—Appendix "K".

Here again this Court should decide the effect of a change in Agency policy subsequent to the entry of a final order.

The complaint below charged that petitioners' advertising and marketing practices are deceptive with respect to (1) the use of the trade name, "Waltham,"[10] (2) prices and preticketing,[11] (3) jewel content of watches,[12] and (4) guarantees.[13]

Hallmark, Inc. was incorporated in Illinois in 1948 and the individual petitioners here were also officers and directors of that company.[14] The corporate petitioner, Waltham Watch Company, was incorporated in Delaware, on May 16, 1957.[15] Pursuant to "Plan of Reorganization" Hallmark and Waltham merged in 1959 and Hallmark was dissolved.[16]

However, even prior to both the formation of the Delaware corporation and the merger of that company with Hallmark Inc., the latter company had acquired, in 1956, a license from the predecessor, Waltham Watch Company of Massachusetts, to use the trade name "Waltham" on watches.[17] Later, after a spin off by the Massachusetts corporation of its watch

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[10] J.A. 3-4, Complaint, Par. Seven (J.A. as used herein refers to the page numbers of the Joint Appendix which is part of the printed record filed herewith.)

[11] J.A. 2, Complaint, Par. Three.

[12] J.A. 3, Par. Five and Six.

[13] J.A. 3, Complaint, Par. Four.

[14] J.A. 9, 10, 11, CX 1A & 1D. (Commission Exhibit).

[15] J.A. 11, CX 2A-M.

[16] J.A. 12, CX 3A-B, CX 4A-D, *June 13, 1959.*

[17] J.A. 13, CX 5A-L, dated *March 23, 1956.*

and clock business to the present Waltham Watch Company, petitioner here, license to Hallmark, Inc. was continued and a new licensing agreement executed.[18] This latter license was amended by a later agreement between Hallmark and the corporate petitioner.[19]

A Massachusetts enterprise created by Aaron Dennison in 1849 was not incorporated in Massachusetts until 1923.[20] Control of that corporation was secured by interests identified as "Axler" in 1956 shortly after the corporation had granted the initial license to Hallmark.[21] Later, in 1957, the Massachusetts corporation by means of a form of reorganization known as a "spin off" transferred to the Delaware corporation "all rights, licenses, trade-marks and trade names, subject to the license granted to Hallmark Inc."[22] At the time of the "spin off" in 1957, the old Massachusetts corporation changed its name to "Waltham Precision Instrument Company." Since that date the corporate petitioner has been the only Waltham Watch Company.[23]

Origin of Watches

Both Hallmark under its various license agreements and the present corporate petitioners have uesd the name "Waltham" on imported watches primarily of Swiss origin. The company manufactures and assembles watches from various domestic and imported com-

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[18] J.A. 14, CX 6A-6, dated *July 16, 1957*.

[19] J.A. 14, CX 7A-C, *December 30, 1957*.

[20] Stipulation, J.A. 55.

[21] Stipulation, J.A. 55, See also, CX 5 A-L, J.A. 13, March 23, 1956.

[22] J.A. 55-56.

[23] J.A. 56, See Stipulation, original record pages 96-100.

ponents—the movements being imported, primarily from Switzerland.[24]

Prices

Petitioners preticket their watches with suggested retail prices.[25] Their price lists were distributed to customers, including wholesale catalogue distributors and contained, among other things, the suggested retail, the customer's cost and manufacturer's selling prices.[26]

Customers in the wholesale catalogue area of the market, coded the "dealer cost" into a system of pricing which indicated the "suggested retail" for comparison. Such (catalogue) customers regularly sell petitioners' watches at the coded prices, which are substantially less than the suggested retail prices.[27]

Jewels

Petitioners affixed a Resevoil plate containing either four or eight jewels to some watches. This (Resevoil) device is patented and its addition to the movement increases the jewel count. Although the jewels contained in the device are functional, they do not fall within the definition of the Commission for watch jewels, that is, they do not serve as frictional bearings and do not come into contact with a moving part at a point of wear. The petitioners stipulated all facts pertinent to this issue but reserved the right to object to the Order as a matter of law.[29]

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[24] J.A. 60.

[25] CX 98, J.A. 59.

[26] J.A. 59-60.

[27] J.A. 59, 96-104.

[29] J.A. 3, Paragraphs Five and Six of the Complaint.
J.A. 103-104, See also "Initial Decision."
J.A. 109.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitution, Article 1, Section 8, Clause 8

To promote the progress of Science and useful Arts, by securing for limited Times to Author and Inventors the exclusive Right to their respective writing and Discoveries:

The Federal Trade Commission Act; 15 U.S.C.A. 45

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(a)(6) The Commission is empowered and directed to prevent persons, partnerships or corporations . . . . from using unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.

(d) Upon the filing of the record with it, the jurisdiction of the Court of Appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

The Lanham Act; 60 Stat. 433, 458, Act of July 5, 1946, as amended; 15 U.S.C.A. 1064

Provided that the Federal Trade Commission may apply to cancel on the grounds specified. . . . .

The Patent Act of 1952; 66 Stat. 797, Act of July 19, 1952 C950 Sec. 1; 35 U.S.C.A.

101, Inventions Patentable;

> Whoever invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor. . . .

102, Conditions for Patentability; novelty . . . .

A person shall be entitled to a patent unless—

(a) The invention was known or used by others . . . . or patented or described in a printed publication . . . or

(b) The invention was patented or described in a printed publication . . . . or in public use . . . . . or

(c) He has abandoned the patent, or

(d) The invention was first patented . . . . in a foreign country prior to the date of the application . . . . or

(e) The invention was described in a patent granted . . . . by another . . . before the invention thereof by the applicant . . . or

(f) He did not himself invent the subject matter . . . . or

(g) Before the applicant's invention thereof, the invention was made . . . by another . . . . .

282, Presumption of Validity;

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

Tariff Act of 1930: 19 U.S.C. 1001, Ch. 4, Schedule 3, Par. 367(a)(b)(g) Printed as Appendix G, this Brief.

Guides Against Deceptive Pricing, Federal Trade Commission, promulgated January 8, 1964, printed as Appendix E this Brief.

Administrative Bulletin 64-10; Federal Trade Commission, May 6, 1964, printed as Appendix F this Brief.

REASONS FOR GRANTING WRIT

1. The Court has never decided whether an Agency Order should survive administrative change of policy, as a result of which, competitors of the party against whom the Order is entered may acquire commercial advantages if the Agency should elect to enforce that Order.

2. The Final Decree of the Court below enforcing the final order of the Agency is novel and contrary to governing precedents in the law of Trade Marks. Unless this Court reviews this matter a novel precedent limiting the use of established trade marks and trade names on imported goods will serve to stifle competition and frustrate the international nature of our economy.

3. The final decree of the Court necessarily adopts, Findings 8 and 9 of the Commission which are not supported by any substantial evidence and the Order entered thereon as affirmed is contrary to law. There is absolutely no evidence that petitioners' "suggested retail prices" were not established in good faith. Good faith was not an element of proof required by the Complaint. Its inclusion in the Order is based upon "Guides Against Deceptive Pricing" promulgated at about the same time the Order was entered but long after the Complaint issued and the evidence was entered. Nor is there any evidence to support the Order requirement that the petitioners' suggested retail prices exceed the highest price at which substantial sales are made in their trade area. Again, the margin

between selling price and suggested retail in a trade area was not an element of the proceeding until the "Guides," above referred to, were promulgated shortly before the Order was entered. The Order with reference to preticketing is, therefore, arbitrary and capricious, contrary to law and the case should have been remanded for the taking of further evidence bearing upon the points here raised.

4. Patented Resevoil contains jewels that are functional and useful but do not serve as frictional bearings, that is protect against wear from friction by providing a mechanical contact with a moving part at a point of wear. That Definition of "jewels" was established before the Resevoil invention was patented. Its grant of patent represents that it is an advance in the prior art to which the definition is applicable. An appellate court has given a definition of a watch jewel which differs from that of the Commission as set forth in its Order.[30] The jewels used by petitioners here fall within that definition. Since the definition of a jewel as used by the Court of Appeals in the Tornek case is inconsistent with and different than the definition of the Commission, a novel question is presented for determination by this Court.

ARGUMENT

1. The Trade Name "Waltham"

The individual petitioners are required by the Order to cease and desist using the name "Waltham" to describe or designate watches without stating in immediate conjunction therewith the country of origin of each

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[30] *Tornek* v. *F.T.C.*, 276 F. 2d 513.

component not entirely manufactured in the United States.[32]

Although there is evidence that petitioners import movements from Switzerland and other components from various other countries,[33] there is no evidence that such imported components are improperly marked as to their country of origin.

In fact, the physical exhibits in evidence are marked in conformity with the requirements of the Tariff Act of 1930.[34]

In the absence of evidence to the contrary, it must be presumed that components of petitioners' watches are marked to conform to the legal requirements as to country of origin. It is submitted that there is no such evidence and the presumption in favor of petitioners in this regard must persevere throughout this portion of the Argument.

All of petitioner's competitors are importers of movements and of other watch components. Many are traditionally associated with domestic manufacture, yet their trade names, like "Waltham", are being uesd on such imports. None have been charged, as has Waltham here, with deception involving the use of their traditionally American trade names on imported watches.

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[32] J.A. 116

Petitioners will concede that part 3 of the portion of the Order relating to the individual petitioners is proper in the circumstances of this case, but note that the use of the slogans upon which it is based was discontinued when the individual petitioners here acquired control of Waltham.

[33] J.A. 59-60.

[34] 19 U.S.C.A. 1001, par. 367 (b) (g). Appendix "G".

One week after the Order was here entered by the Commission on February 28, 1964, the Commission abruptly changed its policy with respect to country of origin. That change of policy is reflected in Administrative Bulletin 64-10 dated March 6, 1964, which is printed as Appendix F (*infra*).

It is obvious from a reading of that Bulletin that the petitioners have not been afforded the procedural and evidentiary advantages that the Commission's present policy affords all of their competitors. It is submitted that the portion of the order here under consideration has the tendency and capacity to divert trade from petitioners to their competitors, who will be permitted under present policy to engage in practices prohibited petitioners.

Petitioners should be accorded the same commercial privileges and administrative protection that will be afforded their most favored competitors.

II. A Novel Concept

But the proscription of the Order to which the argument is here addressed is challenged on principles of law rooted far more deeply than the ebb and flow of agency policy.

It should be noted that this portion of the Order does not merely require disclosure of the country of origin of imported watch components, it requires *significantly*, that it be disclosed *"expressly, clearly, conspicuously and prominently in immediate conjunction . . ."*[35] with the use of the name "Waltham".

This must be construed to mean that wherever petitioners use their conceded valid trade name, they must,

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[35] J.A. 116.

in conjunction therewith, set forth clearly and conspicuously the country of origin of each and every imported component of the product upon which the name is used. Apart from the sheer folly of such a requirement, the consuming public, like Jason and the Golden Fleece might spend an errant life time determining the nature, origin and source of a product they might otherwise have purchased by spontaneous association of good will with the trade name.

It is apparent that the impact of the Order is directed at the use of the name "Waltham" on imported watches or watches of imported components, and not at mere failure to disclose the origins of those watches and components.

Therefore, the Commission had to conclude as a matter of law that "Waltham" has a legal meaning or connotation which creates deception when it is used, sans qualification, on imported products.

Such a meaning or signification is novel and absolutely without precedent. In essence, the Commission is holding that "Waltham", apart from the secondary meaning which identifies it with the products sold by its owner, has acquired a kind of common acception by virtue of which it has come to mean that such products are made in U.S.A.

What evil would befall Ford and General Motors had the new policy of the Commission, above referred to, not interceded to protect their use of their names on products that are being assembled from components imported from half the Western World? It would appear that only the consumer will suffer if the retention of good will involved in an established trade name, is to be weighed against the economies inherent in im-

portation of foreign components with a foreign marked bill-board as the epitaph swaying the balance or decision in favor of an unobliterated "Ford" or "Chevrolet" as opposed to a more economical product.

> The Law of Tradewarks is one cornerstone of the law of unfair competition: considerations arising out of the competitive relationship, therefore, should prevail over any claimed public right. Such a right cannot be invoked as a shield for the furtherance of unfair competition.[36]

It is conceded that the Waltham Watch Company has acquired by succession the rights to the use of the trade-mark and trade name "Waltham" which had originally vested in a watch enterprise started by Aaron Dennison in 1849 in Waltham, Massachusetts.

The Commission's Order is predicated upon the theory that the unqualified use of the trade name "Waltham" becomes deceptive when the product is composed of imported components.

It is submitted, that the Commission has given to "Waltham" the third meaning that is without precedent. In so doing, it is respectfully submitted, it has blasted away one of the cornerstones of the law of unfair competition by permitting a misconceived sense of public right to prevail over considerations arising out of the competitive relationship. It has invoked this false claim of public right as a shield for the furtherance of unfair competition.[37]

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[36] Callman, Rudolph, "Unfair Competition and Trade Marks" (Callaghan, Chicago, 2nd Ed.) Vol. 3, page 1671.

[37] *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169; 41 L. Ed. 118; 16 S. Ct. 1002 (1896) and see also: *McLean* v. *Fleming*, 96 U.S. 246; 24 L. Ed. 828 (1878).

Admittedly, the owner of the trade-mark or trade name may not use, nor permit the use of such trade-mark or trade name in a manner designed to deceive the public. It is nevertheless respectfully submitted that the lawful owner's decision to use a validly acquired trade-mark or trade name on imported rather than domestic products is not a design for deception.

In the Singer case[38] where the effect of a generic word was in issue, this Court said that it does not follow that the general power vested in the public use the name imports that there is duty imposed on the one using it to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elemental and applies to every form of right and is generally expressed by the aphorism sic utere tuo ut alietum non laedas.

The Commission relies upon the examiner's finding[39] that the sale of imported watches under the trade name "Waltham" is deceptive because the name (has) long (been) associated by the public with entirely American products, made in Waltham, Massachusetts! The Court in affirming acquiesced.

Since there is no evidence of deception and because the allegedly false representations involved the use of a validly acquired trade name, the use of that name without qualification on imported goods can become deceptive, false and misleading only if that name has acquired a third meaning which identified it with products made in the U.S.A.

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[38] *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169; 41 L. Ed. 118, 16 S. Ct. 1002 (1896).

[39] J.A. 114, Findings 14, 15.

There is no precedent for such a proposition, none has been cited nor can any be inferred from the precedents relied upon below.

"Waltham" Does Not Mean "made in U.S.A." It is a valuable property right now owned by the petitioners.

After the spin off the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., which has been engaged in the precision instrument business (other than watches) in Waltham, Massachusetts. The petitioner Company has been engaged in the manufacture, importation, distribution and sale of watches since the spin off, and since the merger with Hallmark, Inc., its plant and principal place of business has been located in Chicago.

Petitioners own valid and subsisting trade-mark registrations of "Waltham" originally acquired by the old Massachusetts corporation.

The proposition that a trade name can acquire a meaning which identified the products upon which it is used with American manufacture, must, we submit, be squarely confronted by this Court, unless that novel concept is to be judicially sanctioned.

III. Secondary Meaning

"Waltham" has acquired a secondary meaning which had been judicially recognized by 1899.[40] By that time it had acquired common acceptation by long and continuous use and had lost its primarily geographic significance.

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[40] *American Waltham Co.* v. *U. S. Watch Co.*, 173 Mass. 85; 52 N.E. 141 (1899).

In other words, though it originally had meant "watches made in Waltham, Massachusetts," by 1899 the court had come to recognize that it had lost that geographic significance and come to mean watches manufactured by the owner of the trade name. Had it not acquired this secondary meaning, it could not have become a trade name.

Now the Commission, by its Order, as affirmed by the Court and in the proposition of law stated above as its basis, would restore the geographic significance which Waltham had lost by 1899. In fact, it would not only restore that geographic meaning, but broaden it from mere identification of a town in Massachusetts to mean "made in the United States" when used on watches. There is no precedent to support such a restoration and the cases relied upon below are not authority for it.[41]

Waltham, like all competitors, marks the country of origin under the numeral "6" on the face or dial of the imported watches in conformity with the requirements of the Bureau of Customs.

Obviously, the Commission's Order affirmed by the Court singles out Waltham in a highly competitive industry and would unfairly and inequitably require it to "water down" its trade name, while competitors, whose acts and practices are identical, will continue to use their equally well established trade names without qualification or limitation.

The value of a trade name or trade-mark is vested in the right to use it for advertising and marketing

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[41] *Edw. P. Paul & Co., Inc.* v. *Federal Trade Commission*, 169 F. 2d 294 (C.A. D.C. 1948). Compare *F.T.C.* v. *Walker's New River Mining Co.*, 79 F. 2d 457, 586, (C.C.A. 4, 1935).

purposes. It would appear that the Commission, having a mandate from the Congress to maintain fair competition, is here fostering unfair competition.

The Waltham Case Decided in 1899[42] Is Res Judicata on the Issue of Secondary Meaning, and the Order Below in Conflict With That Decision.

The Waltham Case is a landmark in the law of secondary meaning and discussed by every authority who has written in the field of trade names and trade-marks.

The Court there decided that the predecessors of petitioners here had made the name Waltham so widely known for watches that the primary trade meaning of the word "Waltham" in fact indicated that Plaintiff's article and not the geographical locality. Consequently, the Court deemed the name "Waltham" a valid common law trademark and enjoined the defendant absolutely from using Waltham in a trademark sense and in particular from advertising its watches as Waltham watches. But the Court went even further enjoining the defendant from a non-denominative use of the term by also forbidding it to state upon the dials of its watches that they were made in Waltham. The defendant was not even allowed to use the name Waltham, Massachusetts, on the inner plates of its watches without an accompanying statement clearly distinguishing its watches from those of the Plaintiff.[43]

Geographical names having attained a controlling secondary meaning have been held valid regardless of the domicile of the producer. It is common knowledge,

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[42] *American Waltham Co.* v. *U. S. Watch Co., supra.*

[43] Derenberg, Walter, "Trade Mark Protection and Unfair Trading," Matthew Bender, Albany, N.Y., 1936, page 341.

for instance, that a consumer buying "Paris" garters,[44] "Philadelphia Cheese,"[45] etc., does not believe or understand that the product he is buying emanates from the geographical place captured in the trade name.

In the "Phillies" cigar case[46] the right to use the word "Phillies" in the tradename was upheld even though the evidence established that as far back as 1932 many of the company's cigars were manufactured in New Jersey.[47]

It is also well settled that the right to protection of a geographical name that has acquired secondary meaning, "is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a trade name . . ."[48]

IV. The Effect of Waltham's Move to Chicago From Massachusetts

Since it may be conceded that Petitioners could have escaped the bondage of the negative limitation or positive disclaimer required by this Order had they remained in Massachusetts after acquiring control of the company, the Court must inquire into the significance of the move to Chicago.

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[44] *A. Stein & Co.* v. *Liberty Garter Co.*, 198 F. 959 (D.C.S.D.N.Y. 1912).

[45] *Intl. Cheese Co.* v. *Phoenix Cheese Co.*, 103 N.Y.S. 362 (1907).

[46] *Bayuk Cigars* v. *Schwartz*, 1 F. Supp. 286 (D.C.N.J. 1932).

[47] See also: *Anheuser-Busch* v. *Budwiser Malt Products Co.*, 295 F. 306 (C.C. A. 2, 1923); *Hyde Park Clothes, Inc.* v. *Hyde Park Fashions, Inc.*, 204 F. 2d 223 (C.C.A. 2, 1953).

[48] Nims, Harry D., "Unfair Competition and Trade Marks, (Baker, Voorhis & Co., Inc., N.Y., 4th Ed. 1947). Vol. 1, page 318.

The Commission has never challenged the validity of the present ("spin off") company's title to the trade name and trade-mark "Waltham". However, by virtue of its order, it does challenge the right to use those properties in Chicago in the same manner they could have been used had economic or other considerations advised management to remain in Waltham and import as the Massachusetts corporation had prior to the Hallmark license.

Petitioners respectfully submit that the Commission and the Court below in so doing completely ignores the wealth of law controlling this question.

The prominent trade-mark authority, Harry D. Nims, has treated this subject at some length:[49]

> The right to protection of a geographical name used to indicate source, is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a trade name. This is not a reason why he may not continue to claim protection in the use of the name of the place where formerly he was located, if prior to the time of his removal he has acquired a secondary meaning as used by him. (Badlin v. Cusenier, 221 U.S. 580, 31 Supreme Court 669 (1910).)

In *Siegert* v. *Gandolfi*,[50] it is stated that:

> If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstances that the manuufacturer might have removed his place of business and is making his product in some

[49] *Supra.*

[50] *Siegert* v. *Gandolfi*, 149 F. 100 (C.C.A. 2, 1906).

other place is of no more consequence that it would be if he had adopted the fancy name.

The law appears settled. The right to use a valid geographic tradename which has acquired secondary meaning is vested in the owner of that trade name irrespective of the status of the business, once the right to use is acquired.

The propostion underlying the Order here would require all name brand manufacturers to either discontinue the importation of foreign components and products (contrary to economic public policy), or to label the ultimate product like a bill-board, disclosing the foreign origin of each imported component. There is no basis in law to support that proposition.

A trade name once acquired cannot, as the Commission contends, pass into the public domain. The property right vests, rather, in the owner of the trade name. It identifies the product with the owner and becomes a property which is subject to the owner's control. The public has no vested interest in the exercise of control over private property of this nature any more than it does over general rights in and to personal property.

V. Preticketing and Pricing

The Order, as here pertinent, is addressed to all petitioners and requires them to cease and desist "Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondent's trade area.[51]

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[51] J.A. 125.

Paragraph three of the Complaint[52] had charged petitioners with engaging in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. . . . also disseminated . . . . price lists, catalogues, catalogue insert sheets, . . . and other forms of advertising in which certain amounts are shown as the retail prices . . . (they) thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth, "watches are usually and customarily sold at retail and are fictitious retail prices."

The examiner in his Initial Decision had entered Findings 8 and 9, as follows:[53]

> 8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.
>
> 9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail prices.

But the Commission substituted its own findings for those above quoted:[54]

> 8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

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[52] J.A. 2.

[53] J.A. 113.

[54] J.A. 123.

> 9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales made in their trade area by those customers, thus the retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers, this practice is dealt with in Guide III of the Commission's revised "Guides Against Deceptive Pricing". . . .

Apart from the absolute absence in the record below of any evidence of knowledge, honest estimate, good faith or trading area, how can the petitioners ever comply with the provisions of the Order based upon those elusive findings?

They are, of course, based on the Commission's "Guides Against Deceptive Pricing" (See Appendix "E", this Petition) which were promulgated January 8, 1964, or a little more than one month before the Order was entered, but nearly two years after the hearings had ended.[55] No evidence from which inferences can be drawn in favor of the substituted findings, nor the conclusions of the Order based thereon, appears in the entire record below.

The Order can not stand unsupported by any evidence and the cause should have been remanded for further proceedings for the purpose of receiving evidence based upon intent, knowledge, good faith, honest estimate and the trading area.

But, this Court may well consider reversing the Order and dismissing Paragraph Three of the Complaint if the Guides upon which the Order is based are

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[55] The Initial Decision is dated November 19, 1962, J.A. 122.

being applied retroactively by the Commission. If Petitioners had the Guides to inform them, they might well have introduced evidence to support the position that their practice is in conformity to the Guides. The retroactive application of standards we submit is, arbitrary, capricious and constitutes a denial of administative due process of law.

The Commission decided three similar cases at or about the same time that it entered the Order that is here under review.[56]

Two of those cases were disposed of by Orders similar to that under discussion, the third was dismissed.

In dismissing the *Bulova* case, the Commission reversed the Initial Decision of one of its Examiners, finding no evidence to support an Order under its new "Guides". The Opinion of the Commissioner in *Bulova* is included *infra* as Appendix "H".

One of the Commissioners would not concur in the *Benrus* decision, yet wrote the Opinion in the *Gruen* case. (see Appendices "I" & "J". Another of the Commissioners participated and apparently agreed with the majority in this (*Waltham*) case and in the *Benrus* case, but did not concur in *Gruen* and did not participate in *Bulova*.

An analysis of the Opinions and Orders in the four cases (all of which are printed *infra* Appendices "H" & "I", this Brief, and J.A. 123-125 for the Order in this case) is confusing in that the evidence discussed in each is essentially the same, yet various members of

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[56] *Benrus Watch Co., et al.*, matter of, F.T.C. Docket 7352, (Elman dissenting); *Gruen Industries Inc., et al.*, matter of, F.T.C. Docket 8455 (MacIntyre dissenting); *Bulova Watch Co., Inc., et al.*, matter of, F.T.C. Docket 7593 (MacIntyre not participating).

the Commission appear to disagree not only with the majority in specific cases, but with themselves from case to case.

The confusion is heightened by the Order in *Clinton*[57] and the Statement of Commissioner MacIntyre in *Regina*[58] (*infra,* Appendices "L" & "K", respectively, this Brief)

It is notable that one of the Commissioners did not concur in Commission Order modifying outstanding Order in those two cases and that he entered "Statements" annexed to the modification orders in each of the cases. (also annexed to Appendices "L" & "K" *infra*)

This same Commissioner did not concur with *denial* of a petition to modify a similar Order in still another case.[59] (*infra,* Appendix "M", this Brief) and at the time the "Guides" were released by the Commission, entered his separate statement (*infra,* Appendix "K", this Brief) declaring his opposition to the "Guides".

In light of the evident confusion of the Commission itself with reference to its newly promulgated "Guides Against Deceptive Pricing", what magic formula will petitioners need devise in order to effectively comply with rule of practice incorporated into the Order that one of the Commissioners applies differently from case

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[57] *Clinton Watch Co., et al.,* matter of, F.T.C. Docket 7434 (Order on Petition to Reopen Proceeding and Statement of Commissioner MacIntyre.

[58] *Regina Corporation,* matter of, F.T.C. Docket 8323 (On Petition to Modify Statement of Commissioner MacIntyre).

[59] *Art National Mfg. Dist. Co., Inc., et al.;* matter of, F.T.C. Docket 7286, Order Denying Petition to Modify, dated May 8, 1964.

to case on the same essential facts while another steadfastly refuses to acknowledge their validity?

VI. Jewels

Paragraphs Five and Six of the Complaint[60] allege that petitioners purchase "17 jewel watch movements made in an imported from Switzerland, add a device containing 4 or 8 synthetic jewels, and affix attachments to the watches and case the movements. The watches are then represented as "21" and "25" jewel watches, ... (thus) represented that said watches contained 21 and 25 jewels, each of which serves a mechanical purpose as a frictional bearing, and that, each jewel provides a mechanical contact at a point of wear. In fact, the jewels in the device . . . are not functional and these watches are not 21 and 25 jewel watches as represented and advertised."

It is petitioners' position that (1) all jewels in watches form parts of bearings; (2) all jewels in watches are synthethic; (3) a jewel to be represented as such and designated as such in a watch movement must be functional; (4) the pleaded definition is antiquated and inconsistent with the advance in the prior jewel bearing art, represented by the grant of patents to the inventor of the device (Resevoil) which is conceded to be that used by the petitioners; and (5) has been supplanted by the Court's definition of a watch jewel in an earlier case involving an earlier patent of a similar device; (6) that the jewels in the device here fall within the Court's definition and petitioners' representation, and accordingly are neither deceptive nor misleading.

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[60] J.A. 3.

In addition, it should be noted here that the portion of the Order to which their argument is addressed is inconsistent with the charge of the Complaint and, in reality, incorporates into its proscription part of the old definition as pleaded in the Complaint, and, in part, adopts the definition established in the *Tornek* case. (*supra*)

As is here pertinent, the Order provides that the individual petitioners cease and desist[61]

> Representing . . . that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which *serves a purpose of protecting against wear from friction* by providing a mechanical contact with a moving part at a point of wear. (Emphasis supplied)

In *Tornek,*[62] the circuit court, upon review of a Commission Order involving another Resevoil patent reflected its review of that record by stating the following definition of a watch jewel, with which petitioners concur:

> Examination of the testimony before the Federal Trade Commission shows clearly that in the 21 jewel watches sold by others in the trade, there are no jewels that do not serve *either a function of bearing or a function of preventing against wear from friction.* (Emphasis supplied)

As will be noted from a close scrutiny of (1), the definition pleaded in Paragraph Six of the Complaint,[63]

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[61] J.A. 124.

[62] *Tornek* v. *F.T.C., supra.*

[63] J.A. 3.

(2) the definition incorporated in the Order here pertinent[64] and (3) the quoted definition from the Court's definition as set forth in the *Tornek* case (*supra*), the Commission has here abandoned the ill-founded concept of a mechanical purpose as a frictional bearing (as pleaded), adopted one of the two alternative functions adopted by the Court in Tornek (protect against wear from friction), and combined it with the remaining portion of the pleaded definition so as to corrupt the judicial expression into a meaning not intended by the circuit court.

Obviously, the circuit court in *Tornek* would have simply stated that a jewel must protect against wear from friction by providing a mechanical contact at a point of wear had it concluded it to be a sufficient statement of the definition of a jewel. However, the Court, having reviewed that record at length, determined otherwise, and stated that a jewel must either protect against wear from friction or serve the function of a bearing—but must not serve both of these functions as the Order here requires.

Indeed, since the evidence stipulated justifies that Resevoil jewels such as petitioners here are alleged to have used and concede that they did, do, as integral components of jewel bearing assemblies into which they are incorporated upon "affixing the device", perform the function of protecting against wear from friction. They do so by adding life-giving lubrication to the bearings to which they are assembled and all experts agree that the lubrication function is the principal feature performed by all jewels in all watches.

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[64] J.A. 124.

But apart from such evidence,[65] it must be conceded that the patent upon which the jeweled device affixed to 17 jewel movements, as alleged, are *prima facie* evidence of the utility of the invention and its advance in the prior art.

Since the presumption is not rebutted in the record, the Fichter patents must protect the Fichter invention of a functional device known as Resevoil, which the patents themselves establish as an advance in the prior art of jewel bearings.

CONCLUSIONS

Wherefore, Petitioners pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[65] Which is incorporated into the record below by the Stipulations referred to in the "Statement of the Case", *supra*, and not physically a part of the record here.

APPENDIX A

(Filed Mar. 1, 1965)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,647

WALTHAM WATCH COMPANY, a corporation, et al., *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Final Decree Affirming and Enforcing Order to Cease and Desist

Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation, petitioners herein, having filed in this Court on May 25, 1964, a petition to review and set aside an order to cease and desist issued against them on February 28, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation, Docket No. 8396"; and the matter having been heard by this Court on briefs and oral argument on January 12, 1965; and this Court having on February 2, 1965, entered its judgment affirming the order to cease and desist and directing that it be enforced;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED by the court that petitioners shall forthwith comply with the aforesaid order of the Federal Trade Commission.

WILBUR K. MILLER
Senior Circuit Judge

GEORGE T. WASHINGTON
Circuit Judge

JULIUS WRIGHT
Circuit Judge

APPENDIX B

Decision of the Commission and Order to File Report of Compliance

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's findings of fact and order should be modified and that respondents' appeal should be denied:

It Is Ordered that the initial decision be modified by striking therefrom findings of fact numbered 8 and 9 on page 9 and substituting the following:

> 8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.
>
> 9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales are made in their trade area by those customers. Thus, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers. This practice is dealt with in Guide III of the Commission's revised Guides Against Deceptive Pricing. To provide guidance and assistance to respondence in compliance, an order to cease and desist will be entered in the language of Guide III.

IT IS FURTHER ORDERED that the order contained in the initial decision be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representative and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be mislead as to any of the matters or things prohibited by the above provisions of this order.

IT IS FURTHER ORDERED that Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben

Cole and Morris Draft, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area.

2. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

3. Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order.

It Is Further Ordered that the hearing examiner's initial decision, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Reilly not participating for the reason that he did not hear oral argument.

(seal) /s/ Joseph W. Shea
Joseph W. Shea,
Secretary.

Issued: February 28, 1964

APPENDIX C

(Filed Feb. 2, 1965)

Judgment

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by the court that the order of the Federal Trade Commission on review herein is affirmed, and will be enforced. See *W. M. R. Watch Case Corp.* v. *Federal Trade Commission*, No. 18670, decided January 14, 1965; *Waltham Precision Instrument Co., Inc.* v. *Federal Trade Commission*, 327 F.2d 427 (7th Cir. 1964); *Heavenly Creations, Inc.* v. *Federal Trade Commission*, ... F.2d ... (2d Cir. Nov. 24, 1964); *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F.2d 28 (7th Cir. 1963); *Giant Food Co.* v. *Federal Trade Commission*, 116 U.S.App.D.C. 227, 322 F.2d 977 (1963); and *Helbros Watch Co.* v. *Federal Trade Commission*, 116 U.S.App.D.C. 231, 310 F.2d 868 (1962), cert. denied, 372 U.S. 976 (1963).

Pursuant to Rule 38(l) the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

PER CURIAM.

Dated: Feb. 2, 1965

APPENDIX D

[Filed October 19, 1962]

Initial Decision

By Herman Tocker, Hearing Examiner

Harry E. Middleton, Jr., Esq., of Washington, D. C.
for the Commission

Ben Paul Noble, Esq., of Washington, D. C.
for the Respondent

In a complaint issued May 15, 1961, the Federal Trade Commission charged Waltham Watch Company, a Delaware corporation, and its officers, Harry Aronson, Ben Cole and Morris Draft, both individually and as officers, with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. The acts complained of were related to the sale and distribution of watches by the respondents. In general, they were charged with deceptive pricing activities, false representations as to guarantee and jewel content of watches and deceptive use of the Waltham name.

In their answer, the respondents denied generally the allegations of the complaint. They asserted also that they were defending prior Commission proceedings involving identical issues and thus were subjected to a multiplicity of law suits and harassment.

Waltham Watch Company actually was a respondent in two other cases then pending before the Commission.

In one, Docket No. 6914, it was joined with others not parties to this proceeding. Aronson, Cole and Draft were not respondents there. That case was concerned with alleged deceptive practices involving the jewel content of watches and the use of the name "Waltham". It was decided adversely to the respondents there by the Commission on July 20, 1962.

The other case, Docket No. 7997, was brought against Waltham and Aronson. Other respondents in that case are not respondents here. Ben Cole and Morris Draft, respondents in this case, were not charged there. It was concerned with, among other things, the alleged deceptive use of the name "Waltham" in the sale of clocks. It was decided adversely to the respondents there by the Commission on June 15, 1962.

Waltham's present officers, the individual respondents here, are admittedly responsible for its most recent business practices. Even though the use of the name "Waltham" was involved in the other cases and jewel content was involved in one of them, this case need not be regarded as a repetition of the prior litigation nor as an unwarranted harassment. Since the individual respondents constitute new management of Waltham and the effect of the allegations was that they were persisting as such in Waltham's prior practices, some of which had been litigated in the other cases, it seems proper that Waltham be joined as a respondent with them. We are here concerned with their conduct in their administration of Waltham's activities. (The fact that Aronson also was a party in Docket No. 7997, involving, among other things, the Waltham name, does not alter this. That was the case concerned with clocks as distinguished from watches.)

Moreover, there is more to this proceeding than jewel count and use of the Waltham name. As stated above, this proceeding is concerned also with alleged deceptive price practices and claimed false guarantees. These last were not involved in the prior cases as far as Waltham and Aronson were concerned.

Together with their submission of proposed findings of fact, conclusions of law and order, respondents have filed a formal "Motion to Dismiss Paragraphs 5, 6, 7 and 8 (in part)" of the complaint. While the Hearing Examiner has some doubt whether he could consider a motion such as

this, which attacks the Commission's exercise of its discretion to issue the complaint in this proceeding while the two prior proceedings were pending, in view of the outcome of those proceedings and the action to be taken by the Hearing Examiner in this proceeding, he concluded that respondents' motion need not be decided. To the extent that Waltham Watch Company already is subject to an order of this Commission requiring it to cease and desist from practices related to jewel count and use of the Waltham name, the Hearing Examiner will not duplicate such order or orders by any action here. He believes that one Commission order directing that a party cease and desist from a particular action is sufficient and it is not necessary that an additional order issue providing the same remedy. In a sense, this appears to be the relief sought by respondents in, and the only purpose, of their formal motion.

The Pretrial Order, the Hearing Examiner's certification to the Commission and the Commission's approval of the Hearing Examiner's recommendation that he be permitted to hear this proceeding first in Chicago, then in Milwaukee, then in Minneapolis, and finally again in Chicago, all were predicated on the expectation that the issues herein would be litigated bitterly and that hurried trips would be made from city to city in order expeditiously to complete the proceeding. However, on the day that the Hearing Examiner left Washington to commence the hearing, he received the decision and opinion of the Commission dated July 20, 1962, in the case bearing Docket No. 6914. These became available to all counsel on the morning set for the opening of the hearing. That decision clearly and definitely ruled that Waltham Watch Company was to cease and desist misrepresenting the jewel content of watches and using the name "Waltham" without clearly stating the country of origin of its watches or using the Waltham name in a historical sense for the purpose of describing its watches. In addition, Commissioner Philip Elman in the opinion stated,

Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate. *Cf., Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419.

Respondents appear to have been very much impressed by the possibility that an application for modification at some future time might receive favorable consideration and, in their defense of the instant proceeding, apparently began to lay the groundwork for a demonstration of good faith by cooperating most commendably in the simplification of the issues and the elimination of evidence which would have been necessary to bring the individuals within the restrictions of the order already effective against Waltham. This resulted in more leisurely sessions than had been anticipated.

They have stipulated sufficient to justify the issuance in this proceeding of an order against them similar to that entered against Waltham in the case bearing Docket No. 6914. It should be observed, however, that while their stipulation of facts is sufficient to permit the issuance of such an order in this proceeding, they do not agree thereby, as a matter of law, that, upon the facts stipulated, the order is right.[1] They assume also that, regardless of

[1] On the legal justification for the jewel count ruling, the Commission's prior decisions and *Allen* v. *Tornek Company*, 276 F. 2d 513, 107 App. D.C. 267, all cited by Commissioner Elman in Docket No. 6914, are conclusive. As to the use of the Waltham name, apart from what was said by Commissioner Elman in his opinion

whether it is right or not, if, in the future, the Waltham order be modified or suspended, they will receive the same treatment and have the benefit of such modification or suspension. (In this connection it should be noted clearly that whether this is to be done is not at all the function or concern of the Hearing Examiner, but the sole prerogative of the Commission.)

This leaves for consideration in this proceeding only the issues involving alleged deceptive pricing and alleged false guarantee. The deceptive pricing portion of the case is concerned with (a) advertising by respondents of published "list" or alleged "retail selling prices" separately from or in catalogue sheets prepared for the use of catalogue companies such as are described at some length by Commission Chairman Paul Rand Dixon, in his opinion in *Leeds Travelwear, Inc.*, Docket No. 8140, October 3, 1961, slip printing pages 4 to 7 inclusive, and, (b) with the tagging, affixing or use of price tickets on or in connection with the watches in the form or package in which they are offered and delivered for sale. The evidence as to the deceptive nature of the advertising and use of the list prices, whether the same be in general advertising, in catalogue sheets or in the form of preticketing, is adequate and sufficient to support remedial action in this proceeding. A long dissertation is not necessary here. Numerous witnesses testified, and it is clearly to be concluded from their testimony, that Waltham watches are customarily sold at prices far below (a) the advertised prices, (b) the alleged or

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in Docket No. 6914 above, respondents' argument that the owner of a trademark has the right to cheapen or "water it down" leaves this Examiner unimpressed. It ought to be quite clear that, regardless of what trademark a business may own, it cannot use that trademark for the purpose of deception. How long would any man whose own true name was Howard Johnson be permitted to operate a roadside restaurant and call it "Howard Johnson's" without qualification? Would any clothier who happened to have a customer, James F. King, get away with advertising during the John F. Kennedy administration that JFK buys his clothes there?

stated "retail price" in the catalogue sheets prepared by respondents for the use of catalogue houses, and (c) the prices on the tickets or labels attached to or packaged together with the watches when offered and delivered for sale. Respondents' officers, the individuals involved herein, have too long an experience and background in business, particularly the watch business, not to be fully aware of the manner in which the business of the catalogue houses is conducted. They know, as the witnesses testified here, almost anyone who knows about and has the desire so to do (a) can obtain access to a catalogue house and (b) can purchase any article offered by the catalogue house at the coded price rather than at the so-called or represented "retail price". The Hearing Examiner believes that, separate and apart from this litigation, the individuals involved herein certainly would be embarrassed or outraged if it were suggested that they were so naive that they did not have this awareness or did not know how the catalogue houses for which they supply the catalogue insert sheets operate. *Leeds Travelware, Inc.*, Docket No. 8140, *Rayex Corporation*, Docket No. 7346, *Baltimore Luggage Co.* v. *Federal Trade Commission*, Docket No. 8382, C.A. 4, 296 F.2d 608, Cert. Den'd, 369 U.S. 860, *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838, C.A. 7.

To the exent that respondents urge that the prices advertised by them should be regarded only as "suggested retail prices", their position is rejected. Their argument seems to be pitched at this Hearing Examiner's reasoning in his Initial Decision in the Regina case, November 16, 1961, which was not adopted by the Commission.* Nevertheless, the facts in this case are not at all similar. In Regina there was no advertising or preticketing. In this case there are both. It also is clear that the respondents here knew that their "list prices" were not the usual and customary retail prices. Since, with that knowledge, they

* The Regina Corporation, Docket No. 8323, June 13, 1962.

furnished and disseminated to vendors advertising containing such prices, they thereby placed in the hands of their vendors the means whereby the public was misled and deceived. This case is aggravated far beyond the Regina case as far as the respondents are concerned. Their apologia that they cannot control the prices at which their watches are sold does not absolve them from the consequences of their own conduct. While there is testimony that the "retail" prices were only "suggested", the facts are to the contrary.

This leaves only the charge with respect to the alleged false guarantee. The testimony and physical exhibits show that the respondents advertised their watches as "Guaranteed", "Fully Guaranteed" and "Lifetime Guaranteed". It was advertising such as this that, in many cases, induced the purchaser to buy one of respondents' watches. This sort of guarantee was featured prominently on all the catalogue sheets. Two propositions of law are elementary. If, at the point when a decision to buy is made, the decision is brought about by a false of deceptive statement, the deceptive practice must be stopped. The word "guarantee" must be accompanied by clear and conspicuous words of limitation if the guarantee is in any way limited, even to the extent of a small fee such as a handling charge. Here, in most instances, the vice was greater. A potential customer, turning the extent that any proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality or lack of support in the evidence, as contrary to law, or as unnecessary.

After careful consideration of the entire record, the following are my

FINDINGS OF FACT

1. Respondent Waltham Watch Company (hereafter "Waltham") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

2. During some of the time involved herein, the individual respondents, Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc. a corporation which had been organized under the laws of the State of Illinois and had its office and principal place of business located where Waltham is now located. Hallmark, Inc. was merged into Waltham in June 1959.

3. The individual respondents thereupon became and have continued to be officers of the corporate respondent. They formulate, direct and control its acts and practices and they formulated, directed and controlled the acts and practices of Hallmark, Inc. prior to the merger. Their offices and principal place of business are the same as that of Waltham.

4. In the course and conduct of their business, respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause such products, when sold, to be transported from the State of Illinois and elsewhere to purchasers located in various other States of the United States and in the District of Columbia.

5. Respondents have maintained a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. Respondents have engaged in the practice of attaching or causing to be attached price tickets to their products. A price ticket is a label or tag upon which an amount in dollars and cents or dollars alone is printed for exhibition to or view by a prospective customer of the article

being offered for sale. Such amount is a representation to the prospective customer that the article is reasonably worth the amount shown and that it is usually sold at that price.

7. Respondents also have disseminated or caused to be disseminated urice lists, catalogue insert sheets, brochures, leaflets, newspaper and magazine advertisements and other forms of advertising in which certain amounts are shown as the retail prices of their products.

8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.

9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail and are fictitious retail prices.

10. Respondents, in their advertising, catalogues, brochures and other promotional material, represent that their products are "Guaranteed", "Fully Guaranteed" or "Lifetime Guaranteed".

11. In truth and in fact such representations as to guarantee are false, misleading and deceptive because, only after having purchased a watch, if the purchase be made by mail, or only after having carefully read the guarantee certificate which accompanies the watch at the time of purchase or after the purchase, if the purchase be made over the counter, is the customer informed of the fact that the guarantee is a limited guarantee and that a service charge is required to be paid by the customer incident to the performance of the guarantee, as limited.

12. The respondents purchase 17-Jewel watch movements, made in and imported from Switzerland, add a device containing 4 or 8 synthetic jewels, affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale, and sold by

respondents as "21" or "25" Jewel Watches to retailers, catalogue houses and wholesale distributors.

13. By means of the statements that the said watches are 21 and 25 jewel watches, respondents represent that they contain 21 or 25 jewels, each of which serves a mechanical purpose as a frictional bearing and that each jewel provide mechanical contact at a point of wear. In fact, the additional jewels in the device added by the respondents are not functional and the watches are not 21 and 25 jewel watches as represented.

14. The respondents have advertised their watches in newspapers, jewelers' trade magazines, nationally distributed magabine, catalogues, catalogue insert sheets and circulars, and on labels and packages. Among and typical but not all inclusive of the statements appearing in such advertising material have been the following:

"Waltham Watches—timing the nation since 1850"

"Waltham Premier, a famous name, part of the American scene since 1850".

15. By means of such statements, respondents have represented directly or by implication that their watches are manufactured in the United States by the same Waltham Watch Company of Waltham, Massachusetts, which had been an old and well-known company and that they were the same interests which had controlled that company during times long prior to the acquisition by them of their control of the name thereof. Such statements are false, misleading and deceptive. In truth and in fact (a) such watches are not manufactured in the United States, (b) are not manufactured by what had been the old and well known Waltham Watch Company of Waltham, Massachusetts, and (c) respondents acquired only recently control of a company which had been incorporated in Delaware in 1957 under the name "Waltham Watch Company" to

acquire assets involved in a "spin off" from the Old Waltham Watch Company of Massachusetts.

16. By the said acts and practices respendents have placed in the hands of retailers and other means and instrumentalities whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of frictional bearing jewels and the origin and manufacturer of respondents' watches.

17. Respondents in the course and conduct of the sale of their watches have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

18. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had and now has the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that they are true and into the purchase of substantial numbers of their watches in consequence of such erroneous and mistaken beliefs. Substantial trade in commerce has been unfairly diverted thereby to the respondents from their competitors and substantial injury has been done to competition in commerce.

From all of which and upon the whole record I have made the following

Conclusions

A. That all the respondents, whether charged in their corporate official or individual capacities, are engaged in the business of importing, assembling and distributing in commerce, watches from Switzerland and that the individual respondents are responsible for the acts and practices of the corporate respondent and for the acts and practices set forth above.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

C. This proceeding is in the interest of the public.

D. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

E. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

ORDER

IT IS ORDERED that respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of

said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850.", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

IT IS FURTHER ORDERED that Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft individually and as officers of said corporation and their agents, representatives and employees, directly or through any corporate or other devise in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commisison Act, do forthwith cease and desist from:

1. The act or practice of pre-ticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalogue sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where

offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

3. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

4. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise or the terms of any claimed guarantee affecting the same.

/s/ HERMAN TOCKER
Herman Tocker,
Hearing Examiner.

October 18, 1962.

APPENDIX E

FEDERAL TRADE COMMISSION
Washington

GUIDES AGAINST DECEPTIVE PRICING

Effective January 8, 1964.

* * * * * * * * * * *

Guide III—Advertising Retail Prices Which Have Been Established or Suggested By Manufacturers (Or Other Non-Retail Distributors)

Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number

of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

There are many methods by which manufacturers' suggested retail or list prices are advertised: large scale (often nation-wide) mass-media advertising by the manufacturer himself; pre-ticketing by the manufacturer; direct mail advertising; distribution of promotional material or price lists designed for display to the public. The mechanics used are not of the essence. These Guides are concerned with *any* means employed for placing such prices before the consuming public.

There would be little problem of deception in this area if all products were invariably sold at the retail price set by the manufacturer. However, the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare cases are *all* sales of an article at the manufacturer's suggested retail or list price.

But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

This general principle applies whether the advertiser is a national or regional manufacturer (or other non-retail distributor), a mail-order or catalog distributor who deals directly with the consuming pubilc, or a local retailer. But certain differences in the responsibility of these various types of businessmen should be noted. A retailer competing in a local area has at least a general knowledge of the prices being charged in his area. Therefore, before advertising a manufacturer's list price as a basis for comparison with his own lower price, the retailer should ascertain whether the list price is in fact the price regularly charged by principal outlets in his area.

In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however, the list price is being followed only by, for example, small suburban stores, house-to-house canvassers, and credit houses, accounting for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive.

On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. Consider the following example:

Manufacturer Roe, who makes Brand X pens and sells them throughout the United States, advertises his pen in a national magazine as having a "Suggested Retail Price $10," a price determined on the basis of a market survey. In a substantial number of representative communities, the principal retail outlets are selling the product at this price in the regular course of business and in substantial volume. Roe would not be considered to have advertised a fictitious "suggested retail price." If retailer Doe does business in one of these communities, he would not be guilty of a deceptive practice by advertising, "Brand X Pens, Manufacturer's Suggested Retail Price, $10.00, Our Price, $7.50."

It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. For instance, a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions.

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/s/ JOSEPH W. SHEA
Secretary.

APPENDIX F

FEDERAL TRADE COMMISSION
Washington

May 6, 1964

Administrative Bulletin 64-10

Subject: Foreign Origin Matters.

PURPOSE AND SCOPE

1. This Bulletin contains instructions which shall govern staff processing of all foreign origin matters.

A. These instructions shall control all actions of the operating Bureaus of Deceptive Practices and Industry Guidance and all advisory functions of the Bureau of Economics.

B. There shall be cooperation and consultation at all times among the three Bureaus to achieve uniform compliance with these instructions.

DEFINITION

2. Foreign origin matters involve:

A. Affirmative misrepresentation of the country or place or origin of a product or its components; and

B. Failure to disclose the foreign country or place of origin of a product or its components.

CUSTOMS MATTERS

3. All foreign origin matters within the jurisdiction of the Bureau of Customs[1] shall be referred to it by the liaison officer[2] unless he believes that the Bureau's remedy would

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[1] 19 U.S.C. 1304.

[2] Pursuant to appointment by the Executive Director dated August 16, 1961, James A. Murray, Assistant Director of the Bureau of Deceptive Practices, is liaison officer with the Bureau of Customs.

be inadequate *and* that the matter meets the criteria of paragraphs 4 or 5 below.

A. When the liaison officer believes that the Commission should retain jurisdiction he shall make a report and recommendation to the Commission, and no action shall be taken unless ordered by the Commission.

Other Foreign Origin Matters

4. Country-of-origin matters involving affirmative misrepresentation of country of origin are to be treated like other deceptive-practice matters.

5. No action shall be taken in any matter involving nondisclosure of country of origin unless there is a clear and compelling probability that substantial deception and public interest are involved.

A. Among the factors to be considered in evaluating the substantiality of the public interest are:

(1) The volume of interstate sales of the products;

(2) The relative importance of the product to consumers;

(3) The significance to the public of the deception; and

(4) Whether nondisclosure of country of origin is an industry-wide practice, or respondent's nondisclosure has caused substantial diversion of business from competitors.

B. In a matter involving a product as to which only a component is of undisclosed foreign origin, no action shall be taken unless such component:

(1) Is a principal part or ingredient, or is a primary functional element; and

(2) Is not promptly replaceable by one of like quality available in the United States.

C. In a matter involving nondisclosure of foreign origin in an advertisement, no action shall be taken unless ordered by the Commission.

D. Country-of-origin nondisclosure matters shall be accorded low priority.

Additional Considerations

6. Upon determination by the liaison officer that any action in connection with any foreign origin matter may be in conflict with the foreign trade or any other policy of the United States, he shall make a report and recommendation to the Commission; and no such action shall be taken unless ordered by the Commission.

Corrective Action

7. No complaint shall be forwarded for issuance by the Commission unless settlement by administrative treatment or other voluntary procedure has been considered and found to be either clearly inappropriate or ineffectual, which finding shall be set forth and supported in the forwarding memorandum.

By direction of the Commission.

JOHN N. WHEELOCK,
Executive Director

DISTRIBUTION: Professional Staff

APPENDIX G

The Tariff Act of 1930 (as amended) 19 U.S.C.A. 1001, Ch. 4, Sched. 3, Par. 367, (a), (b) and (g)

Par. 367

(a) Watch movements, . . . (other timing devices specified)

(b) All the foregoing shall have cut, engraved or die sunk, conspicuously and indelibly on one or more of the top plates or bridges: The name of the country of manufacture; the name of the manufacturer or purchaser; in words and in Arabic numerals the number of jewels, if any, serving a purpose as frictional bearings; and in words or in Arabic numerals, the number and classes of adjustments, or, if unadjusted, the word unadjusted".

(g) Any of the foregoing cases, containers, or housings, shall have cut, engraved, or die sunk, conspicuously and indelibly on the inside of the back cover, the name in full of the manufacturer or purchaser and the name of the country of manufacture.

APPENDIX H

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 7583

In the Matter of

BULOVA WATCH COMPANY, INC., a corporation.

Opinion of the Commission

This matter is before the Commission for consideration of exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and by counsel for respondent.

The amended complaint in this matter in effect charges respondent watch manufacturer with having violated Section 5(a)(1) of the Federal Trade Commission Act[1] by pre-ticketing its watches with fictitious prices and thereby representing, directly or by implication, that said prices are the usual and customary retail prices for such watches in the trade areas where offered for sale, when in truth and in fact the watches usually sell for substantially lower prices. The complaint further charges that by the above practice respondent places in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for its watches. Respondent's an-

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[1] 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. § 45(a)(1).

swer essentially denied all material charges of the complaint.

To prove his case, counsel in support of the complaint relied principally upon testimony of twenty-four watch retailers from the following four communities: New York City; Newwark, New Jersey; Boston, Massachusetts; and Washington, D. C. Counsel for respondent produced thirty-one rebuttal witnesses from the latter three of the above areas.

On October 11, 1962, the hearing examiner issued his initial decision, holding that the allegations of the complaint had been sustained in only the Washington, D. C., area. The order proposed by the hearing examiner would require respondent to cease and desist from falsely preticketing watches ". . . for sale in Washington, D. C., and other jurisdictions in which fair trade agreements are not enforced . . ."

Respondent has taken exception to the hearing examiner's finding that the evidence concerning the sale of respondent's watches at retail in Washington, D. C., provides sufficient basis for the order and has requested that the complaint be dismissed. Counsel in support of the complaint has taken exception to the order on the basis that it is too narrow, in view of the hearing examiner's finding that the watches had been sold in all of the above-mentioned communities ". . . at various prices less than the preticketed price."

Subsequent to the date on which the initial decision herein was filed, the Commission promulgated Guides Against Deceptive Pricing (effective January 8, 1964) which deal specifically with practices of the type challenged in this proceeding. Guide III thereof relates to the advertising of retail prices which have been established or suggested by manufacturers and states in pertinent part:

> ". . . Typically, a list price [which includes a preticketed price] is a price at which articles are sold,

> if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.
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> ". . . a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice."

We have reviewed the record in this case and can find no evidence that respondent has pre-ticketed its watches with amounts in excess of the highest prices at which substantial sales were made in the area in which it was doing business. As a matter of fact, the record discloses that in three of the four communities selected by counsel supporting the complaint to show that respondent engaged in fictitious pricing, the products are fair traded and the pre-ticketed prices are the prevailing prices of this merchandise.[2] The hearing examiner has made the following find-

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[2] It also appears that even in the one community, Washington, D. C., where the examiner found that the pre-ticketed prices were "meaningless", twelve dealers testified that they sold rspondent's watches at the pre-ticketed prices and the majority of these dealers testified that they sold exclusively at such prices.

ing concerning the retail prices of respondent's watches in these communities:

> ". . . with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its pre-ticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary, the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of predetermined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City, and Boston, Massachusetts trade areas."

Under these circumstances we find no basis for holding that respondent's pre-ticketed prices were fictitious or that the practices challenged by the complaint were deceptive under the new pricing guides. Consequently, the complaint will be dismissed and an order so providing will be issued herewith.

Commissioner MacIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

February 28, 1964.

APPENDIX I

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 7352

In the Matter of

BENRUS WATCH COMPANY, INC., a corporation;
BELFORTE WATCH COMPANY, INC., a corporation;
S. RALPH LAZRUS, OSCAR M. LAZRUS, and BENJAMIN LAZRUS, individually and as officers of aforesaid corporations;
and
HARVEY M. BOND, STANLEY M. KARP, NORMAN SLATER, SAMUEL M. FELDBERG, JAY K. LAZRUS, ROBERT WEIL, MARTIN J. RASNOW, ROBERT GASSER, CLIFFORD L. J. SIEGMEISTER, LEO HYMAN and JULIAN LAZRUS, individually and as officers of BENRUS WATCH COMPANY, INC.

Final Order

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondents having timely filed exceptions to the order proposed, which were opposed by a reply thereto filed by counsel supporting the complaint; and the Commission, upon review of these pleadings, having determined that the

exceptions filed by the respondents should be disallowed and that the order proposed should be entered as the final order of the Commission:

It Is Ordered that the initial decision be modified by striking the findings in paragraphs 7 and 9 through 15 contained in the Findings of Fact and substituting therefor the findings and conclusions of the Commission contained in the Commission's opinion.

It Is Further Ordered that the initial decision be modified by striking therefrom all paragraphs under the heading "Conclusions" except for those under the Roman numeral IX.

It Is Further Ordered that respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above-named corporations, and Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford, L. J. Siegmeister, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise setting forth an indicated retail price as to merchandise in any material disseminated or intended for dissemination to the public, when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

2. The act or practice, in connection with the use of trade-in allowances, allowance certificates, coupons, or other promotions offering price reductions, of setting forth an indicated retail price for which reductions or allowances are to be made unless there is a generally prevailing retail price in the market in which the act or practice is engaged in, and such indicated retail price is not in excess of the generally prevailing retail price in said market.

3. Representing, directly or by implication:

   a. That their merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor shall perform thereunder are clearly and conspicuously disclosed.

   b. That their watches are "shock proof" or "shock protected" or otherwise representing that their watches possess greater shock resistance than is a fact.

   c. That dealers in their merchandise will allow a certain amount against the indicated retail price thereof upon the presentation of an allowance certificate or coupon or for any reason in connection with the purchase of said merchandise, unless such allowance is granted without exception.

4. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.

5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing of coating of precious metal of less than 1-1/2/1000

of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

6. Supplying to, or placing in the hands of, any jobber, retailer, dealer, or other purchaser, means and instrumentalities by and through which they may deceive and mislead the purchasing public in respect to practices prohibited in paragraphs 1 through 5 above.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to respondent Robert Gasser and as to respondent S. Ralph Lazrus, who is deceased.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to respondents Norman Slater, Martin J. Rasnow and Leo Hyman in their individual capacities.

IT IS FURTHER ORDERED that the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that the respondents, except Robert Gasser and S. Ralph Lazrus, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman not concurring in the provisions of the order, and Commissioner Reilly not participating.

SEAL

/s/ JOSEPH W. SHEA
Secretary

ISSUED: February 28, 1964

APPENDIX J

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 8455

In the Matter of

GRUEN INDUSTRIES, INC., a corporation, trading as GRUEN WATCH COMPANY.

Opinion of the Commission

By Commissioner Elman:

The complaint in this matter charges respondent, a leading manufacturer of watches, with having preticketed its merchandise with fictitious retail prices, in violation of Section 5 of the Federal Trade Commission Act. In its amended answer, respondent admitted that it had engaged in the unlawful practice charged in the complaint. Consequently, the trial before the hearing examiner was concerned solely with the question of relief. In his initial decision, the examiner entered a cease and desist order containing four paragraphs. Paragraphs 1 and 2 are intended to forbid the specific form of deceptive pricing in which respondent was found to have engaged—what the examiner described as "the wholly artificial and flagrantly deceptive inflation of price tickets" (initial decision, p. 24). Paragraphs 3 and 4, on the other hand, are intended to forbid the deceptive practice of a manufacturer's advertising or disseminating fictitious suggested retail prices. However, in a proviso to paragraphs 3 and 4, the examiner

ordered these provisions of the order suspended, on the ground that immediate entry of a "broad" order against respondent would be inequitable because its principal competitors were not subject to such orders.

Complaint counsel have appealed from the initial decision, challenging the suspension proviso and also suggesting certain modifications in the language of the examiner's order. Respondent has also appealed, contending that paragraphs 1 and 2 of the examiner's order are too broad and that paragraphs 3 and 4 should be suspended pending promulgation of a Trade Regulation Rule by the Commission (see Section 1.67 of the Commission's Procedures and Rules of Practice (August 1, 1963)) dealing with the general problem of fictitious pricing in the watch industry.

As already noted, there is no issue as to respondent's violation of law. Concededly, respondent preticketed merchandise with retail prices it knew to be grossly in excess of what the merchandise would actually command in the retail market. These prices were not *bona fide* estimations of retail value; they were not respondent's customary suggested retail prices for the merchandise in question. These inflated prices were, rather, deliberate fabrications made at the demand of certain retailer customers of respondent who were bent on deceiving the buying public with the offer of nonexistent bargains.

Nothing in the Commission's newly revised Guides Against Deceptive Pricing (issued January 8, 1964) justifies respondent's conduct. On the contrary, the unlawfulness of such conduct is made explicit in Guide III: "a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions" (p. 5). However, while the revised Guides do not change the law with respect to such conduct, they have a definite bearing on the issue of relief—the only issue before the Commission.

As both the parties and the hearing examiner appear to recognize, the fact that respondent has been found guilty of a particularly flagrant form of an unlawful practice does not justify an order limited to the particular flagrant acts; rather, it emphasizes the necessity for an order that will effectively prevent the recurrence of the unlawful practice—here, the practice of a manufacturer's advertising or disseminating fictitious suggested retail prices for his merchandise. Guide III of the Commission's newly revised Guides Against Deceptive Pricing deal explicitly and at length with this practice. Accordingly, we have drafted an order to cease and desist in the language of Guide III.

Should respondent desire guidance with respect to the requirements of this order, the provisions of Guide III should prove helpful. The Guides are designed to afford practical, concrete guidance and assistance to the businessman as to the requirements of law, or, in this case, to respondent as to the requirements of the cease and desist order. If respondent in the future conforms in good faith to the standards set forth in Guide III, it will be in compliance with the Commission's order. In addition, if Guide III does not answer all of the specific questions that may arise as to respondent's duties under the order, the Commission's procedures afford ample opportunity for obtaining definitive advice from the Commission as to the application and interpretation of the order. Section 3.26(b), Procedures and Rules of Practice (August 1, 1963); see e.g., *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F. 2d 480, 488 (2d Cir. 1962).

Our modification of the cease and desist order contained in the initial decision renders unnecessary an extended discussion of respondent's contention that the "broad" parts of the order should be suspended pending promulgation of an industry-wide Trade Regulation Rule. The unduly broad portions of the order contained in the initial

decision, which caused concern to the examiner and to respondent, have been eliminated. With respect to the modified order we are entering, what the Commission recently stated in rejecting a similar contention made by another watch manufacturer is apposite:

> "The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondent's competitors. However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized—in relation to fictitious pricing—by the recently revised Guides." *Clinton Watch Co.*, F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964.

Commissioner MacIntyre did not concur, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

February 28, 1964.

APPENDIX K

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 8323

In the Matter of

THE REGINA CORPORATION, a corporation.

Statement of Commissioner MacIntyre

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued January 8, 1964. In the petition now before us, respondent, Regina Corporation (Regina), requests that the order be set aside in its entirety on the ground that the activities documented by the record do not constitute a violation of Section 5 of the Federal Trade Commission Act as presently interpreted by the Commission in the light of the revised Guides. In the alternative, Regina asks that the order be explicitly modified to conform to the new Guides.

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

> ". . . the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in

their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records."

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceedings brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964). The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for recision, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist orders only upon a

finding that a violation of law has occurred.[1] Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing on respondent's future conduct. The justification that a review of the record in this proceeding would be either unduly troublesome or time-consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave

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[1] Section 5(b) of the Federal Trade Commission Act states in pertinent part: "... The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served ... an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice ..."

off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.[2]

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified Regina's order by elaborating on its *"pro tanto"* modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964), with which I was unable to agree at that time.[3] In this instance, in addition to stating that all outstanding orders shall be interpreted and "thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing", the Commission has specifically amended the order to require respondents to cease and desist from the following:

> "Advertising or disseminating any list or pre-ticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area."

As I stated in *Clinton Watch Company, et al.*, Docket No. 7434,[4] respect for the businessmen who come before us, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. Although the modification of the *Regina* order is somewhat more elaborate than that of *Clinton*, Regina's obligations are defined with no greater clarity than those of the watch company under its modified

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[2] See my statement on the revised Guides, issued January 8, 1964.

[3] See my statement, *Clinton Watch Company, et al.*, Docket No. 7434, February 17, 1964.

[4] *Id.*

order. The modified order in this proceeding is a classic example of the enforcement problems which may be expected from the use of terms which have not been adequately defined by either the courts or this agency.[5] In this case the Commission has done again what the Supreme Court said we should not do, namely, shifted to the courts the burden of determining the factual question of what constitutes unfair conduct. See *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948). I must reiterate my surprise that this Commission, which recently has made so many pronouncements of the necessity for clear and definative orders is, in the deceptive pricing area, issuing orders, the terms of which are so imprecise and indefinite that they can lead only to administrative and judicial confusion.[6]

April 7, 1964.

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[5] For example, respondent, under the modified order, is required to employ a "good faith estimate" of the actual retail price prior to advertising or disseminating list or preticketed prices. To my knowledge neither the Commission nor the courts have ever defined the criteria for determining the good faith of the seller in estimating actual retail prices in any trade area. There is the further requirement that Regina cease and desist from disseminating list prices or preticketed prices unless such prices do not "appreciably exceed" the highest price at which substantial sales are made in respondent's trade area. Again, there is no precedent which will aid either Regina or other respondents similarly situated or the Commission's staff, for that matter, in determining the meaning of that phrase. The Commission leaves unanswered the question of by what percentage a list price or preticketed price would have to exceed the highest price in a trade area at which substantial sales are made. Respondents and the Commission's staff will be faced with similar difficulties in trying to divine what "substantial sales" might be in a particular trade area. The applicable percentage could conceivably vary from 1 to 100 percent.

[6] See my statement, *Clinton Watch Company, et al., supra* n. 3.

APPENDIX L

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 7434

In the Matter of
CLINTON WATCH COMPANY, et al.

Order on Petition to Reopen Proceeding

Respondents, on January 2, 1964, filed with the Commission a petition, pursuant to Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice, to reopen proceedings in the above-captioned matter for the purpose of suspending the cease and desist order of July 19, 1960, until final orders become effective in certain cases now pending before the Commission. The order against respondents involves fictitious pricing, and respondents contend that they have been placed at a severe competitive disadvantage by virtue of the fact that their competitors have not yet been placed under Commission order, even though, respondents allege, their competitors are engaged in the same fictitious-pricing conduct forbidden by the order outstanding against respondents.

The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondents' competitors. However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such

orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized—in relation to fictitious pricing—by the recently revised Guides. Accordingly,

IT IS ORDERED that respondents' request to suspend the order of July 19, 1960, be, and it hereby is, denied.

By the Commission, Commissioner MacIntyre not concurring.

(SEAL)

/s/ JOSEPH W. SHEA
Secretary.

ISSUED: February 17, 1964

Attached is: Statement by Commissioner MacIntyre.

Statement By Commissioner MacIntyre

I am compelled to issue a separate statement setting forth my views on the Commission's action in modifying the cease and desist order issued against the Clinton Watch Company in this proceeding. The significant provision amending the order reads as follows:

> "... the Commission has directed that all outstanding cease and desist orders involving deceptive pricing

shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. . . ."

I do not concur with this action for the following reasons. Respect for the businessmen who come before it, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. The wholesale *"pro tanto"* incorporation of the provisions in the new Guides, adopted in this instance, affords the Clinton Watch Company no guidance for the regulation of its future conduct with respect to its pricing practices. The Guides, of course, cover a multitude of deceptive pricing practices which may or may not be applicable to the Clinton Watch Company and it is doubtful that the *"pro tanto"* qualification will enlighten either the Commission's staff or resopndent as to precisely those terms of the Guides applicable to the Clinton Watch Company. This difficulty is, of course, compounded by the fact that the Guides themselves still require considerable adjudicative definition before either the courts, the Commission, or the business community will be fully advised of their legal significance. In violation of the Supreme Court's injunction in *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), the Commission here is shifting to the courts the burden of determining the factual question of what constitutes unfair conduct. I am surprised that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders, is in this area embarking on a course which can lead only to administrative and judicial confusion by issuing orders, the terms of which are so imprecise and indefinite that they are likely to be misunderstood.

February 17, 1964.

APPENDIX M

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

Docket No. 7286

In the Matter of

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., INC., a corporation,
LOUIS WATCH COMPANY, INC, a corporation,
and
LOUIS FRIEDMAN, MARTIN FRIEDMAN, and ALBERT FRIEDMAN, individually and as officers of said corporations.

Order Denying Petition to Modify Order and Decision

Respondents, by petition filed with the Commission March 26, 1964, have requested that the deceptive pricing provisions of the order entered against them on May 10, 1961, be altered, modified, or set aside or, in the alternative, have requested advice from the Commission on whether particular practices constitute compliance with the order to cease and desist. The sections of the order placed in issue by this petition are those which prohibited respondents from:

(b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

The entire order was affirmed and ordered enforced in *Art National Manufacturers Distributing Co., et al.* v. *Federal Trade Commission*, 298 F.2d 476 (2d Cir. 1962).

The petition for modification of the above quoted provisions of the order to cease and desist is predicated upon Guide III of the Commission's Guides Against Deceptive Pricing (effective January 8, 1964), which states in pertinent part:

> . . . Typically, a list price [which includes a preticketed price] is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.
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> . . . a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

Respondents assert that a review of the decision in this case reveals that "substantial sales" of their merchandise were made at the "list" price and that had the current Guides been in effect at the time the case was pending before the Commission, the deceptive pricing portions of the charge would have been dismissed. As a result, they now request that the Commission review the evidence in the light of the new guides and alter, modify, or set aside those portions of the order prohibiting deceptive pricing practices.

The standards set forth in the Guides Against Deceptive Pricing are intended to be prospective in their application rather than retrospective. In a case such as this, where the Commission's order has become final and has been affirmed by a United States Court of Appeals, the Commission is of the opinion that it should not review the evidence to determine whether it would support a finding of violation under the new standard. The public interest would not be served if, in the light of every new policy announcement, the Commission were required to undertake the time-consuming task of attempting to review the records of all past cases which might be affected by the policy change. However, the Commission has directed that all outstanding orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on those subject to such orders no greater or otherwise different obligations than are set forth in the Commission's newly revised Guides Against Deceptive Pricing. *Clinton Watch Company et al.*, Docket No.7434, Order on Petition to Reopen Proceeding (February 17, 1964). The separate advice being furnished respondents, in response to their alternative request, as to whether a proposed course of action, if pursued by them, will constitute compliance with the order, reflects an application of this policy to the order in this case.

It Is Ordered that respondents' petition for modification of the order entered against them on May 10, 1961, be, and it hereby is, denied.

By the Commission. Commissioner MacIntyre does not concur for the reasons set forth in his statements accompanying the Commission's orders in *The Regina Corporation*, Docket No. 8323 (April 7, 1964), and *Clinton Watch Company et al.*, Docket No. 7434 (February 17, 1964).

(Seal)

/s/ Joseph W. Shea
Secretary.

Issued: May 8, 1964

APPENDIX N

Commissioner Everette MacIntyre made a separate statement regarding the revised Guides. His statement is as follows:

Statement on the New Pricing Guides

By MacIntyre, Commissioner:

I am wholly in accord with the professed aim of the Commission to clarify some of the more troublesome problems in the deceptive pricing area. I too believe that we should take a reasonable approach in these matters and that the businessman should know where he stands. However, I fear that these Guides, albeit unintentionally, on balance have raised a number of new and troublesome issues which outweight any solutions to older dilemmas which they may suggest.

The hub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

I do not intend at this point to outline my disagreement with the Guides in every detail. If necessary, that can be done as specific problems arise. Suffice it to say for the present, the Guides apparently present us with a new vocabulary in the context of fictitious pricing which will require definition. That process may well be difficult and time consuming. I need only cite one example to make my point. In connection with bargain advertising of retail

price comparisons, i.e., the offer of goods at prices purportedly lower than those being charged by others in the same trade area, the Guides state:

> "... Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be *reasonably certain* that the higher price he advertises does not *appreciably exceed* the price at which *substantial* sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving ..." (Emphasis supplied.)

The requirement that a retailer should be "reasonably certain" that the higher price does not "appreciably exceed the price at which substantial sales of the article are being made in the area" is open to numerous interpretations. The phrase "reasonably certain" substitutes a subjective for what has hitherto been an objective test. How a businessman is to document the state of his mind in this respect is not pointed out. Possibly the ingenuity of counsel over a period of time may supply some answer to this and other questions. The problem remains, however, whether there is any real advantage in abandoning tested precepts which are now understood by business, the courts and the Commission's staff.

To continue, hitherto the standard applied in these cases has been the "usual and customary" retail price in a given area, a term given content and meaning by numerous previous decisions. The proper interpretation of the requirement that the advertised higher price may not "... appreciably exceed the price at which substantial sales of the article are being made in the area..." is at best conjectural. A considerable number of cases will have to be brought and considered by the courts and the Commission before either our staff or the business community can be

expected to operate with any confidence under the new standard.

A very important reversal of policy is, of course, contained in Guide III, which deals with advertising of retail prices suggested or established by manufacturers or other nonretail distributors. In effect, manufacturers or other nonretailers are invited to suggest list prices or preticket their items with only the vaguest standards to determine their responsibility for taking such measures. Whether the Commission will, in the future, be able to take effective steps against fictitious pricing on a regional or national scale under the new dispensation remains to be seen.

APPENDIX O

15 U. S. C. A. 45(a)

Unfair methods of competition unlawful; prevention by Commission — Declaration of unlawfulness; power to prohibit unfair practices.

(a) Unfair methods of competition in commerce, and unfair, or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

APPENDIX P

15 U. S. C. A. 45(b)

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show why an order should not be entered by the Commission reqtiiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been

duly filed within such time, or if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such a manner as it shall deem proper, modify or set aside in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require; *Provided, however,* that the said person, partnership or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

APPENDIX Q

19 U. S. C. A. 1064

CANCELLATION OF REGISTRATION

A verified petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed by any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905—

(c) at any time if the registered mark becomes the common descriptive name of an article or substance,

or has been abandoned, or its registration was obtained fraudulently or contrary to the provisions of section 1054 of this title or of subsection (a), (b) or (c) of section 1052 of this title for a registration hereunder, or contrary to similar prohibitory provisions of said prior Acts for a registration thereunder, or if the registered mark is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services in connection with which the mark is used, or . . .

(e)at any time in the case of a certification mark on the ground that the registrant (1) does not control, or is not able legitimately to exercise control over, the use of such mark, or (2) engages in the production or marketing of any goods or services to which the certification mark is applied, or (3) permits the use of the certification mark for purposes other than to certify or (4) discriminately refused to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies:

Provided, That the Federal Trade Commission may apply to cancel on the grounds specified in subsections (c) and (e) of this section any mark registered on the principal register established by this chapter, and the prescribed fee shall not be required. July 5, 1946, c. 540, Title I, § 14, 60 Stat. 433; Oct. 9, 1962, Pub. L. 87-772, § 9, 76 Stat. 771.

APPENDIX R

The Constitution, Article 1, Section 8, Clause 8

To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.